No. 82-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBER AIRCRAFT CORPORATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* AS AMICI CURIAE

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Brief of the Reporters Committee for Freedom of the Press, Freedom of Information Service Center, Texas Daily Newspaper Association, as Amici Curiae.

INTEREST OF THE AMICI CURIAE[1]

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media. The Committee, founded in 1970, is operated by a Steering Committee of 30 news reporters from around the country. Its legal defense and research efforts are devoted to the protection of the First Amendment and freedom of information interests of the press.

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[1] The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

Counsel wishes to acknowledge the important contributions made to this brief by four present and former students of the University of Maryland School of Law: Deborah Baer, Miriam Fisher, Shelley Latin and Glenn Solomon.

The Reporters Committee has provided representation, information, legal guidance or research in virtually every major press freedoms case that has been litigated since 1970, including Branzburg v. Hayes, 408 U.S. 665 (1972); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980); and Reporters Committee for Freedom of the Press v. Kissinger, 445 U.S. 136 (1980).

Together with the Society of Professional Journalists, Sigma Delta Chi, the Reporters Committee sponsors the FREEDOM OF INFORMATION SERVICE CENTER. The Center provides legal assistance

annually to over 1,000 journalists, reporters, and authors who are using the Freedom of Information Act and other access laws in the course of their newsgathering. The Center has previously appeared as amicus in several major FOIA cases, including Playboy v. Department of Justice, 516 F. Supp. 233 (D.D.C. 1981), aff'd in part, rev'd in part, 667 F.2d 931 (D.C. Cir. 1982); and Bureau of National Affairs, Inc. v. Department of Justice, No. 83-1138 (D.C. Cir. 1983).

The Center, as the primary legal resource of journalists seeking access to government information, is concerned with upholding the spirit and purpose of the FOIA as it was envisioned by Congress when it enacted the law. The Center believes it can provide the Court with special insight into the importance of

military aircraft safety investigation reports to both the public and the press.

The TEXAS DAILY NEWSPAPER ASSOCIATION was founded in 1921 to act as an advocate for reporters, editors and newspaper publishers. Its membership of ninety-six newspapers represents ninety-seven percent of the total daily newspaper circulation in Texas. Included among its members are also newspapers in Clovis, New Mexico, Lawton, Oklahoma, and Alexandria, Monroe and Shreveport, Louisiana.

The association has a long history of involvement in legal efforts to protect and expand freedom of the press on both the state and national levels. Those efforts include filing numerous amicus curiae briefs in Open Meetings and

Open Records Act cases and supporting the efforts of the American Newspaper Publishers Association and the Reporters Committee for Freedom of the Press on a variety of press issues. Among the cases in which the association has participated are Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. 1975), and In re Bruce Selcraig, 705 F.2d 789 (5th Cir. 1982).

In July of this year, the association was one of the leaders in the effort to strike from S. 675 a section which would have severely restricted the release of information on military aircraft accidents. Because of the association's continued interest in maintaining the disclosure of these documents and preserving the concept of

open government, we join this brief as amicus curiae.

The Reporters Committee, the FOI Service Center and the Texas Daily Newspaper Association join together to seek an affirmance of the holding of the Court of Appeals holding that a privilege for witness statements relating to military aircraft accidents should not be incorporated into Exemption 5 of the Freedom of Information Act to withhold information from the public.

SUMMARY OF ARGUMENT

The case before the Court is of great importance to the public and the press because it raises the question of whether the military is accountable to the public for aircraft accidents which injure or kill American service persons. If the government prevails, virtually no information of any factual or decisional consequence will be made public under Freedom of Information Act. The government would be permitted to withhold the Air Safety Investigation, containing statements of military and aircraft equipment manufacturer witnesses. These statements can show what type of defects were in the airplane; whether poor training or drug-related problems may have caused the mishap; what conclusions

the investigaton reached as to the causes of the accident and how to prevent similar accidents in the future.

The position of the Amici Curiae is that the Court of Appeals correctly ordered the disclosure of factual statements by military personnel. Further, we believe that it is appropriate to disclose the opinions of the witnesses because they will add to the public's understanding of why the crash occurred. Of equal importance to the public, we believe, is access to statements given by aircraft equipment manufacturer witnesses.

Our military aircraft program is not only extremely expensive, it is also of critical importance to our self-defense. Prompt disclosure of detailed information about all aspects of the program is

necessary if the public is to exercise its responsibilities in this democracy. The government's basic argument, that confidentiality is required to ensure the cooperation of witnesses, contradicts the fundamental principle of government accountability to the public. Any government agency can argue that it is easier to obtain self-critical information if the criticism remains secret. As reporters, editors and publishers, however, we are dedicated to the proposition that public knowledge is the best way -- in the long run -- to assure that the government corrects problems rather than covering them up. In enacting the Freedom of Information Act, Congress reaffirmed the principle that disclosure -- and not secrecy -- is the more fundamental policy.

The argument of the United States in this case rests on the assumption that the "Machin privilege" covers the requested materials, the statements given in a safety investigation by two members of the Air Force: Captain Hoover, the injured pilot, and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.) Based on this assumption, the government then argues that under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the statements are exempt from mandatory release because they are privileged in civil discovery. The amici curiae do not agree with the Machin court that any portion of an aircraft safety report need be privileged per se. As will be shown below, further, the Machin privilege does not cover statements given safety

investigators by members of the Air Force. It is neither consistent with the decisions of this Court nor in the interest of the public to enlarge the Machin privilege to provide for such coverage. In addition, even if the Machin privilege were enlarged, the Amici Curiae urge this Court not to expand upon its current interpretation of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to include within the scope of the exemption new civil discovery privileges such as the Machin privilege.

ARGUMENT

IT IS NEITHER CONSISTENT WITH THE DECISIONS OF THIS COURT NOR IN THE PUBLIC INTEREST TO ENLARGE THE "MACHIN PRIVILEGE" TO COVER THE REQUESTED MATERIALS

The argument of the United States in this case rests on the assumption that the "Machin privilege" covers the requested materials, statements given in a safety investigation by two members of the Air Force: Captain Hoover, the injured pilot, and an airman who helped to rig the ejection equipment. (Pet. App. 2a-3a.) Based on this assumption, the government then argues that under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), the statements are exempt from mandatory release because they are privileged in civil discovery.

As will be shown below, however, the Machin privilege does not cover statements given safety investigators by members of the Air Force, and it is neither consistent with the decisions of this Court nor in the public interest to enlarge the Machin privilege to provide for such coverage.

In Machin v. Zuchert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), the appellant, the sole surviving member of an Air Force aircraft crash, sought the disclosure of the entire Aircraft Investigation Report. The court held privileged testimony of private parties, conclusions based on such privileged information, and material reflecting Air Force deliberations or recommendations. 316 F.2d at 339. The factual findings of Air Force mechanics

who examined the wreckage, on the other hand, was found not to be privileged. 316 F.2d at 340. Thus, contrary to the Government's assertions about Machin, information similar to the requested materials in this case, that is, information provided by Air Force personnel, was not found to be privileged.

Other courts consistently have followed the lead of Machin in distinguishing between information provided in safety investigations by armed services personnel and information provided by private parties. The former has been released, while the latter has been withheld. See Moore-McCormack Lines v. I.T.O. Corporation of Baltimore, 508 F.2d 945, 948 (4th Cir. 1974); McFadden v. Avco, 278 F. Supp. 57 (M.D. Ala.

1967); O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965).

It is sound public policy to sustain the Machin court's decision that information provided by armed services personnel should be released. Since 1979, 327 Air Force planes have crashed, and 470 people have died. Military Wants Crash Data Kept Secret, The Boston Globe, Aug. 1, 1983, Sec. A, p.1, col.1. Despite petitioner's assertion that the safety record of the Air Force is improving, Brief for Petitioner at 4 n.6, in the first four months of 1983, there were ten planes lost and eleven fatalities. Projections based on these figures suggest that the total number of accidents will be higher this year than in prior years. Flight Safety Best Yet in '82; '83 Off to a Bad Start, Air Force

Times, May 9, 1983, p.7, col.1. While the public may speculate on the causes of these accidents, the true reasons are withheld from public scrutiny, because the military insists on the confidentiality of interviews of its personnel conducted in the course of its safety investigations. Access to these reports is crucial for public understanding because, as the Air Force regulations state, these witnesses frequently provide vital information that leads to the discovery of the cause of a crash and the implementation of life-saving corrective action. A.F. Reg. 127-4, para. 3-8(d) (Appendix to Brief for Petitioner, pp. 3a-4a.)

According to reporters experienced in covering military affairs, the accident safety investigation reports

represent the most complete, accurate and impartial analysis of the causes of an aircraft accident and the need for technical and personnel improvements. See Affidavit of David A. Browde, Appendix A; Affidavit of Fred Kaplan, Appendix B. When such reports are kept confidential, the public cannot ensure that proper corrective actions are taken. Id., Appendix A at paras. 8-11; Appendix B at paras. 7-10. Instead, the public and the Congress must rely on the armed forces to determine - without the review usual to the democratic process - what changes are required to avoid the reoccurrence of the tragedy.

Unfortunately, the confidential and unreviewable process of the military does not result in proper safety improvements being made in every case. In 1978, for

example, Congressman Les Aspin charged the Navy with a systematic coverup of its difficulties in repairing catapult and arresting-gear systems on aircraft carriers. Appendix B, paras. 3-7 and attachment. Aspin stated that in 1970 the Naval Air Test Facility had pointed out the problems in two detailed reports. Although the recommended solutions could have been implemented for less than $100,000.00, no action was taken to remedy the situation. As the result of the Navy's omission, which Aspin characterized as "gross negligence," at least seven planes crashed and four people died in 1978 alone. Id.

From 1970 to 1978, and continuing to this day, the Navy, along with the other branches of the military, consistently have cited "executive

privilege" to refuse requests for access to accident reports. According to the armed services, they are protecting the confidentiality of information obtained from crew members and from members of the public, such as manufacturers' representatives. As important as that confidentiality may be, it is not as important as permitting the public and the Congress access to information necessary to evaluate whether the military is doing its job properly. If an accident is attributed to human error or to the improper handling of public assets, both the public and Congress should have the opportunity to recommend changes in military policy, personnel, and equipment. Disclosure also would permit the public to weigh the costs against the benefits of proposed

improvements and to encourage Congress to approve justifiable expenditures. In addition to sharing these general civic interests, those who live in close proximity to military bases are also interested in monitoring the military's safety efforts for the sake of their own physical safety. Permitting the public and Congress to share in the results of the safety investigation will increase the involvement of all those who are concerned with the need for affirmative steps to improve aviation safety. Thus the public interest clearly militates in favor of disclosure of safety investigations.

Against the clear public interest in release of the safety investigations conducted by the armed services, the military has argued that it must maintain

the confidentiality of witness statements in order to obtain candid information from people directly and indirectly involved with an accident. Clearly, the military has a compelling need to obtain honest and complete information from witnesses to accidents. Enough procedures already are in place, however, to ensure that the need can be met without keeping the information confidential.

First, no Air Force member should feel any threat to his or her job as the result of giving candid information. The reports may not be used as evidence for disciplinary actions or in determining the misconduct or line of duty status of any personnel. A.F. Reg. 127-4, para. 2-5(b) (Appendix to Brief of Petitioner at 2a). Second, if a witness should refuse

to provide the requested information despite these assurances, the Air Force has the authority to order its personnel to testify about their knowledge of the accident. Brief for Petitioner at 3, n.3. Indeed, in some situations, confidentiality may encourage witnesses to be less than truthful because they know they will not be held accountable for their actions.[2]

Information provided by armed services personnel provided in safety investigations was found exempt from disclosure pursuant to Exemption 5 of the

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[2] If necessary, of course, identifying information could be redacted from a statement to protect the personal privacy of the witness. 5 U.S.C. 552(b)(6); Department of Air Force v. Rose, 425 U.S. 352 (1976); see Department of State v. Washington Post Co., 456 U.S. 595 (1982).

Freedom of Information Act in two cases upon which Petitioner relies. Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975), and Cooper v. Department of the Navy, 558 F.2d 274, modified on other grounds, 594 F.2d 484 (5th Cir. 1977), cert. denied, 444 U.S. 926 (1979). Both courts relied in whole or in part on Machin. However, as has been shown, this reliance is misplaced, because in Machin the privilege was not found to apply to information provided by armed services personnel.

In F.T.C. v. Grolier, No. 82-372, (June 6, 1983), this Court held that "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." Exemption 5 applies to

"exempt those documents, and only those documents, normally privileged in the civil discovery context." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). As has been shown, courts applying the Machin privilege in civil discovery, beginning with the Machin court itself, have found that it extends only to information provided by private sources, and that it does not protect information provided by armed services personnel. The reinterpretation of the privilege by the Cooper and Brockway courts cannot be accepted. After Grolier, these cases no longer can be considered good law.[3]

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[3] Even before Grolier, the soundness of Cooper and Brockway was suspect. They rely on a close analogy between the Machin privilege and the predecisional or deliberative process privilege. As the government properly has conceded, however, the deliberative process

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[3] (continued) privilege does not apply in any way to the materials at issue here. Brief for Petitioner, at 32 n.27. While the materials clearly were created before any decision concerning the accident was made, not all predecisional materials are exempt from discovery under Exemption 5. Only predecisional material that is part of an agency's deliberative process is exempt. Further, purely factual materials reflected in deliberative process are not exempt. E.P.A. v. Mink, 410 U.S. 73, 89 (1973); see S. Rep. No. 813, 89th Cong., 1st Sess. 9-10 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). In Mink this Court stressed that, with few exceptions, the legislative history of the Act means that "all factual materials in government records is to be made available to the public."

In applying the distinction between factual and deliberative materials, courts usually place witness statements, like other unevaluated materials, in the former category. See, e.g., Robbins Tire and Rubber Company v. N.L.R.B., 563 F.2d 724 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); Kent Corp. v. N.L.R.B., 530 F.2d 612 (5th Cir. 1977). As the D.C. Circuit noted in a seminal FOIA decision, "unevaluated factual reports ... are frequently used by decisionmakers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt...." Vaughn v. Rosen, 523 F.2d 1136 (1975); see F.O.M.C. v. Merrill, 443

[3] (continued) U.S. 340, 360 (1978) ("the theory is that if advice is revealed, associates may be reluctant to be candid and frank) (emphasis added). In sum, the deliberative process privilege is designed to protect the process of candid discussion of facts, not the process of collecting the facts themselves. See ITT World Communications v. FCC, 699 F.2d 1219, 1238-39 (D.C. Cir. 1983); Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980).

THE LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT SHOWS THAT CONGRESS DID NOT INTEND THAT THE MACHIN PRIVILEGE BE INCORPORATED INTO EXEMPTION 5

If this Court should find that the Machin privilege properly covers the statements of Air Force personnel, the question still remains whether Exemption 5 of the Freedom of Information Act incorporates the Machin privilege. The government has urged an affirmative response to this question on two grounds: first, that Exemption 5 incorporates all the privileges enjoyed by the government in the civil discovery context, including the Machin privilege; and second, that, even under a more restrictive reading of Exemption 5, the Machin privilege is incorporated into the exemption. The Amici Curiae will address these questions in the opposite order. Amici will show

that, first, Congress did not intend that the Machin privilege would be incorporated into Exemption 5. Second, Amici will show that this Court should reject the government's argument that all of the civil discovery privileges are incorporated into Exemption 5. Such an expansion of the Exemption will undermine the carefully drawn statutory scheme of the Freedom of Information Act.

The language originally proposed for Exemption 5 permitted agencies to withhold "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy." After extensive hearings, the language was changed to read "interagency or intra-agency memorandums or letters which would not be available to a private party in litigation with the agency." This

language has been interpreted by this Court as incorporating four privileges: the executive, predecisional or deliberative process privilege, the attorney work-product privilege, the attorney-client privilege and the confidential commercial information privilege. F.T.C. v. Grolier, No. 82-372 (June 6, 1983); F.O.M.C. v. Merrill, 443 U.S. 340 (1979); N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975); E.P.A. v. Mink, 410 U.S. 73 (1973). The government now seeks to enlarge its authority to withhold information through the incorporation of yet another privilege into Exemption 5. There is no support for this enlargement in the legislative history of the Act.

At their hearings on the FOIA, Congressional committees were advised

that under the language originally proposed for Exemption 5 there was some question as to whether investigative files such as aircraft accident reports would be protected from disclosure. For example, the Department of Defense submitted a statement in which it stressed the importance of protecting aircraft accident investigation reports. The Department cited Machin to show that judicial recognition had been taken of the need to protect this kind of information. Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess. 220 (1965). Based on the amendment of the original language of the FOIA and the fact that Congress was advised that the original language jeopardized the protection of aircraft

accident investigation reports, the government contends that Congress intended that Exemption 5 incorporate a privilege to protect statements such as the ones requested here.

A similar argument was made by the government in F.O.M.C. v. Merrill, 443 U.S. 340 (1979), with respect to a privilege for confidential commercial information generated by the government. Just as in this case, the government could point to the fact that the language of Exemption 5 was changed after Congress was advised during hearings that the requested material (Domestic Policy Directives) would not receive adequate protection under the original language. Id. at 357-58. However, the similarity between the two cases ends at that point. None of the other evidence of

Congressional intent relied on by this Court to find that Domestic Policy Directives could be protected by the incorporation into Exemption 5 of a privilege for confidential commercial information can be found to justify the incorporation into Exemption 5 of the Machin privilege to withhold statements by military personnel.

This Court began its analysis in Merrill with the observation that

> Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

Id. at 355. The many differences between the facts in Merrill and this case demonstrate that caution will not be

served by incorporating the Machin privilege into Exemption 5. First, as this Court noted, the federal courts had "long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information" such as Domestic Policy Directives. Id. at 356. As was shown earlier in this brief, the Machin privilege as applied in civil discovery does not encompass the material requested in this case, the statements of Air Force personnel. Second, in Merrill this Court found support in the House Report on the FOIA for the propositions that Congress accepted as valid testimony about the need to protect government-generated confidential commercial information and intended that a privilege for such material be incorporated into Exemption 5. Id. at

357-59. No support can be found in either the Senate or the House Report for the proposition that Congress accepted as valid testimony that aircraft accident reports require protection, or for the proposition that Congress intended that a privilege protecting such material would be incorporated into Exemption 5. Finally, the materials covered by the Machin privilege in civil discovery, those provided by private parties such as equipment manufacturers, frequently qualify for exemption from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4). Unlike the situation in Merrill, therefore, accepting the government's argument here would mean incorporating into Exemption 5 a privilege that substantially duplicates another exemption. See id. at 339. The

conclusion is clear, therefore, that nothing in the legislative history of the Act or the prior decisions of this Court suggests that the Machin privilege should be incorporated into Exemption 5.[4]

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[4] An amendment was proposed to the Omnibus Defense Authorization Act, S. 675, 98th Cong., 1st Sess. Sec. 1009 (1983), to exempt from release under the Freedom of Information Act materials of the type requested in this case. Although it passed the Senate, it was not enacted because the Department of Defense failed to provide Congress with enough information on the need for the amendment. See S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983). As was shown above, the Department of Defense also failed in 1965 to persuade Congress that these materials should be exempt from the release under the FOIA. See pages 28-35, supra. In light of this earlier Congressional consideration and rejection of the Department's position, the defeat of the amendment to S. 675 should be viewed as additional evidence that Congress does not intend that the requested materials be exempt from mandatory release under the FOIA.

incorporate solely the Machin privilege into Exemption 5, the government urges this Court to reinterpret the FOIA and the legislative history of Exemption 5 to incorporate within it all the privileges enjoyed by the government in civil discovery. It contends that if the Court fails to do this, litigants could use the Freedom of Information Act as a means to circumvent civil discovery limitations on access to information, with the result that the government would become a "second-class litigant."[5] The problem with the government's argument is that,

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[5] A recent consultant's report to the Administrative Conference disputes the validity of this claim. E. Tomlinson, Report to the Administrative Conference, The Use of the Freedom of Information Act for Discovery Purposes (Aug. 1983).

if accepted, the carefully structured scheme of the Freedom of Information Act would be undermined.[6]

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[6] It is worthy of note that, in contrast to the current position of the government, the Attorney General gave a much narrower interpretation of Exemption 5 in his initial interpretation of the Freedom of Information Act. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967). The Memorandum was an effort "to correlate the text of the act with its relevant legislative history" and to provide agencies with a "sound working basis" for using the Act. Id. at iv. According to the Memorandum, "any internal memorandum which would 'routinely be disclosed to a private party through the discovery process in litigation with the agency' is intended by the clause in Exemption (5) to be 'available to the general public' (H. Rep. 10) unless protected by some other exemption." Id. at 35 (emphasis added). In noting the types of materials withholdable under Exemption 5, the Attorney General pointed out that "internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between

A few examples will suffice to demonstrate that incorporation of civil discovery privileges into the Freedom of Information Act will result in more information being withheld from the public than is the case under the current interpretations of the Act's exemptions.

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6 (continued) officials or agencies, opinions and interpretations prepared by agency personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups remain exempt so that free exchange of ideas will not be inhibited." Id. at 35. Contrary to the government's arguments in this case, the memorandum does not suggest that Exemption 5 covers witness statements given by armed services personnel, nor does it suggest that Exemption 5 properly is interpreted as incorporating every civil discovery privilege.

In Halkins v. Helms, 598 F.2d 1 (D.C. Cir. 1978), the plaintiffs, 27 individuals and organizations formerly active in opposing participation by the United States in the war in Vietnam, requested in discovery information pertaining to government interception of their foreign communications. The court upheld the government's assertion of the state secrets privilege with respect to the information. According to the court, the information is privileged from civil discovery where "there is a reasonable danger that compulsion of evidence will expose military matters which, in the interest of national security, should not be divulged." Id. at 9 (emphasis added).

In contrast to the Halkins v. Helms standard, Exemption 1 of the FOIA mandates that information can be withheld for national security reasons only where it is properly classified pursuant to the criteria of the Executive order on classification. 5 U.S.C. 552(b)(1); cf. E.P.A. v. Mink, 410 U.S. 73 (1973). Executive Order 12065 was the applicable Executive order at the time of the Halkins decision. E.O. 12065, June 28, 1978, Weekly Compilation of Presidential Documents, vol. 14, no. 26, p. 1194 (July 3, 1978). Under the least restrictive standard of that Order, "confidential" information could be classified only where its unauthorized disclosure "reasonably could be expected to cause identifiable damage to national security," a much higher standard than

that applied by the Halkins court. Id., Section 1.104. As the dissenters noted in Halkins,

> [T]he standard applied by the panel ... produces the anomalous result that a FOIA requester, who may have no special need for the requested information, is given broader access to government information than a plaintiff who requires the information in order to pursue remedies for violation of constitutional rights. ... Henceforth, plaintiffs seeking information in a civil suit will simply file a simultaneous FOIA request to reap the advantage of the broader inquiry under FOIA.

Halkins v. Helms, supra, 598 F.2d at 16 (dissenting opinion of Bazelon, Jr., joined by Wright, J. on decision not to grant rehearing en banc). See Baez v. Department of Justice, 647 F.2d 1328, 1337 (D.C. Cir. 1980). If the government's assertion that Exemption 5 incorporates all civil discovery privileges enjoyed by the government, the

Halkins standard would replace Exemption 1, and, depending on the applicable Executive order, less information may be released to the public.

Another example is found in County of Madison, N.Y. v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981), in which the FOIA requester sought the release of documents relating to settlement negotiations between the government and a third party. Although these would be privileged in civil discovery, the court declined to expand Exemption 5 to permit the documents to be withheld under the Freedom of Information Act. If the government's argument in this case had been law, the requested documents would have been withheld. See id. at 1040; Center for Auto Safety v.

Justice Department, 3 GDS para. 83,239 (D.D.C. 1983).

Discovery decisions are based on a balancing between the need of one party to obtain the information against the need of the other party either to protect the information or to avoid the inconvenience of producing it. So long as the balance is fair, a district court may deal out "rough justice" in deciding discovery disputes without being reversed by an appellate court. If these results were translated into the FOIA context by the expansion of Exemption 5 to incorporate all the civil discovery privileges enjoyed by the government, much information that in the past has been released to FOIA requesters instead would be withheld. Compare Playboy Enterprises, Inc. v. Department of

Justice, 677 F.2d 931, 936 (D.C. Cir. 1982) with Peck v. United States, 88 F.R.D. 65 (S.D. N.Y. 1980). A good example is Swanner v. United States, 406 F.2d 716 (5th Cir. 1969), in which the court refused to overturn the district court's decision that entire investigatory files could be withheld in civil discovery, because it was clear that certain portions of the file undoubtedly would be found to be privileged. Following the 1974 amendments to the FOIA, only those portions of investigatory files that meet one of six specific criteria may be withheld; the remainder of the information must be segregated from the exempt material and made available to the requester. 5 U.S.C. 552 U.S.C. 552(b)(7)(A)-(F); see FBI v. Abramson,

456 U.S. 615 (1982); cf. Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973). Thus, while no "blanket" exemption for investigatory files now exists under the FOIA, one could be created if the government's suggested expansion of Exemption 5 were adopted by this Court.

As these few examples demonstrate, the incorporation into Exemption 5 of all of the civil discovery privileges enjoyed by the government jeopardizes the balance struck by Congress between the public's need for information and the government's need for secrecy. If it is true, as the government contends, that enactment of the FOIA made the government a "second-class litigant," it should seek its relief from the Congress, rather than

asking this Court to disrupt the Congressional plan.

CONCLUSION

The Senate Report on the Freedom of Information Act sets forth as the Act's purpose the establishment of "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 98th Cong., 1st Sess. 3 (1965). The Committee stressed that the bill was "not a withholding statute but a disclosure statute," and explained that "[i]t sets up workable standards for what records should and should not be open to public inspection." Id. at 5. Congress heard testimony from many witnesses who advocated that the government be permitted broad authority to withhold material under the parameters of Exemption 5, and yet it enacted a narrow

exemption with a limited number of recognized privileges. Had Congress intended for Exemption 5 to incorporate every civil discovery privilege enjoyed by the government, it would have so indicated either in the Reports or in the "clearly delineated statutory language." Id. at 3.

The FOIA is a precisely-structured statutory scheme for requiring the release of government information. If Exemption 5 is interpreted as permitting the withholding of all information which can be found privileged in civil discovery, without regard to whether there is an overlapping exemption or an intention on the part of Congress for the specific information to be withheld, the exemption will grow to permit the withholding of types of information that

Congress was not contemplating when it enacted the FOIA. In short, the precision of the statutory scheme will be sacrificed to broad withholding claims on the part of the government. The primary purpose of FOIA, to provide information to the people served by a democratic government and to the press that disseminates information to the public, will be sacrificed as well.

KAREN SYMA SHINBERG CZAPANSKIY,
Counsel for Amici Curiae

Of Counsel:
Jack C. Landau
Elaine English

December 1983

APPENDIX A

AFFIDAVIT OF DAVID A BROWDE

1. I am a news correspondent for WNEW, an independent television station in New York. Previously, I was the National Security Correspondent for Independent Television News Association (ITNA), an independent news service providing national news coverage to 21 independent television stations around the United States. I specialize in reporting on activities of the Department of Defense, including the Air Force and the Department of Navy.

2. I first became aware of the problems in gaining access to military accident investigation reports in 1979, as the military affairs reporter for WVEC-TV in Norfolk, Virginia. I

was investigating an accident involving a U.S. Navy ship, the "Francis Marion" and a Greek vessel, the "Star Light". In that collision, the damage sustained was relatively low dollar value , however, one sailor lost his legs and others were injured.

3. Through the Freedom of Information Act, I was able to obtain one of the Navy's accident investigation reports. This report contained descriptions and an account of the incident, technical evidence, maps depicting the accident scene, and summaries and chronologies showing how the accident scene appeared after the investigation. Certain names and all recommendations and conclusions were deleted.

4. The Navy's second report, known as an Article 31 report, was

also withheld. The Navy claimed that disclosure was prohibited because of the necessity of assuring confidentiality to all witnesses who participated in the Article 31 proceedings. According to the Navy, witnesses were promised that their testimony would only be used to develop preventive measures to insure that similar accidents did not occur.

5. The information I received disclosed the facts surrounding the incident as determined by the Navy, but I had no idea of who was at fault, the cause of the accident, or what action would be taken in response to the collision.

6. On May 26, 1981, an EA-6B aircraft crash-landed on the flight deck of the U.S.S. Nimitz during

training exercises in the Atlantic Ocean off the Florida coast. This accident took more than ten lives and cost approximately one quarter billion dollars to repair. There were allegations that drug use contributed to the accident, but the Navy refused to release the Article 31 reports to confirm or deny these charges.

7. After my Freedom of Information Act request, the Navy classified as "confidential" and withheld certain videotapes which showed the actual crash. I thereafter sued the Navy to obtain these tapes, but lost my challenge in both U.S. District Court and in the Court of Appeals.

8. In my opinion, accident investigation reports are important to

the public because they represent the best and most impartial analysis of what went wrong in an accident.

9. Withholding these reports is an easy way for potentially embarrassing material or evidence of a generic fault in an aircraft or subsystem to be buried out of the public's view.

10. Though the military has a strong self-interest in correcting faults that may be revealed by these reports, the solutions often suggested by the military officials involve huge costs and expenditures. As taxpayers and citizens, the American public has an interest in knowing about these costs and in monitoring any remedial action which is taken.

11. I believe that certain technical information requiring

special protection can be safely maintained while a maximum amount of information regarding the causes of accidents and often deaths of American soldiers is released. Although reporters rarely wish to damage national security, I believe that it is possible to safeguard that security while still providing complete information about the cause of an aircraft accident.

In accordance with 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

//s//
David A. Browde

November 28, 1983

APPENDIX B

AFFIDAVIT OF FRED KAPLAN

1. I am presently a defense correspondent for the Boston Globe. I have also written for other publications, including the N.Y. Times, Washington Post, Atlantic, Scientific American, Der Spiegel, The New Republic, and American Heritage.

2. I have frequently used the Freedom of Information Act and Executive Order declassification procedures, especially while researching a book about nuclear strategy (published earlier this year by Simon & Schuster) called "The Wizards of Armageddon."

3. From 1978-80, I was legislative assistant to Representative Les Aspin (D-Wis.) and

it was during that time that I actually saw aircraft safety investigation reports -- the same kind of documents which are the subject of this lawsuit.

4. Late in 1978, I began to receive reports from a confidential source inside the Navy. They were "casualty reports" concerning a number of Naval aircraft accidents, involving A-7s, F-14s, and an EA-6B, which had occurred in recent years. The documents clearly indicated that many of the crashes were caused by technical flaws in the catapault and landing-gear equipment, especially the Capacity Selector Valve control system, onboard aircraft carriers.

5. From another source inside the Navy, I received reports which

revealed that in 1970, the Naval Air Test Facility in Lakehurst, New Jersey had warned the design agency, the Naval Air Engineering Center, and the Naval Air Systems Command that this equipment was faulty and could cause accidents. However, no action was taken on these recommendations. In 1978 alone this problem led to at least 7 plane crashes with 4 fatalities.

6. Rep. Aspin requested formal access to these documents, but the Navy denied his request citing "executive privilege," notwithstanding the fact that as a member of the House Armed Services Committee, Aspin had top security clearances. See Press Release of January 22, 1979, attached to this affidavit.

7. From all the documents I saw regarding these accidents, the cause of the crashes was clear and the remedies were known and not expensive (technical people at the time told Rep. Aspin that corrections could be made for approximately $100,000). However because of the military's practices regarding air accident reports, the cause and the remedy -- more to the point, the guilt and the responsibility -- were kept bundled in secrecy. Indeed, were it not for these leaks, no one outside the Navy would have ever found out what caused these crashes.

8. The public most certainly has an interest in having access to these reports. Some military accidents are caused by "human error." However,

many are caused by negligence of the military service, i.e., the government. The government must be held accountable for such negligence. Many officials with whom I have spoken, as a reporter, are convinced that the regulations on air accident reports are so strict precisely because the military wants to elude that accountability.

9. Pentagon legal officials say, quite correctly, that witnesses called to testify before boards of inquiry may be reluctant to tell the whole truth if they think their words might be used to incriminate themselves or their superiors. However, just because certain portions of an accident report might be sensitive does not mean that, as a consequence,

the entire document must be locked up, away from the eyes not only of the general public but even of Congressmen.

10. In my research, I have received numerous documents from the government where exempt or classified portions have been segregated out and deleted, it seems that similar procedures could be adopted to protect the truly sensitive portions of aircraft safety investigation reports, while still providing essential factual information about the crash to the public.

In accordance with 28 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

//s//
Fred Kaplan

December 2, 1983

PRESS RELEASE FROM CONGRESSMAN LES ASPIN
RELEASE TIME:
Monday, January 22, 1979, A.M. Papers
For further inquiry contact Fred Kaplan

442 Cannon Building
Washington, D.C. 20515
202 225-3031

NAVY CLAIMS "EXECUTIVE PRIVILEGE,"
REFUSES AIRPLANE CRASH DOCUMENTS TO ASPIN

WASHINGTON, D.C. -- The Navy has claimed "executive privilege" in refusing to release standard reports on military airplane crashes, Rep. Les Aspin (D-Wis.) announced today.

Last month, Aspin charged the Navy with "gross negligence" for not repairing catapult and arresting-gear systems on aircraft carriers, an omission that may have caused at least seven plane crashes and four deaths over the past year.

Shortly after, Aspin requested copies of Navy Safety Center reports entitled "Fixed-Wing Catapult Mishaps" and "Fixed-Wing Recovery Mishaps," detailing aircraft-carrier accidents from 1970 to the present. He also asked for a copy of the Inspector General's report on the Naval Air Engineering Center, which designed the faulty equipment.

Aspin has been told by reliable sources that these documents indicate the defective systems caused still more accidents over the years.

But the Navy refused Aspin's request, citing "executive privilege."

"This refusal has all the appearances of a systematic cover-up," Aspin remarked.

"The 'executive privilege' claim isn't even relevant. And the fact that the Navy took more than a month to respond to my request indicates that their legal staff must have searched every nook and cranny to find something on which they could pin a refusal," Aspin commented.

"The Navy cited two cases in current litigation to justify their refusal, yet these cases are not applicable to my request," Aspin said.

Attached to the Navy's letter to Aspin, dated January 10 refusing access to the documents, was an affidavit written by Secretary Claytor on May 26, 1977. Referring to a lawsuit pending in a Florida

district court, Claytor denied the plaintiff access to aviation accident reports, citing "executive privilege."

In the affidavit, Claytor argued that Navy accident reports are based on information obtained confidentially from crew members, and that they are to be used strictly for improving aviation safety, not for pressing lawsuits.

The Navy refused copies of the reports to Aspin because delivering "portions of these...to Congressman Aspin for his use in a non-Committee function could be used to rebut Navy's contention that aviation safety is the only purpose of this report."

Aspin commented, "First, this claim of executive privilege does not have the authority of law, but is just a position taken by the Navy in two lawsuits still pending.

Second, as the Navy well knows, my investigation of this matter pertains solely to improving aviation safety, which I don't think certain people in the Navy are treating seriously enough."

Aspin released information on December 7 detailing the causes of various Navy airplane crashes and called for a Congressional investigation, which is now in its preliminary stage in the House Armed Services Committee.

"The Navy's 'executive privilege' claim makes things look more suspicious than ever," Aspin stated. "I regret it because this sort of tactic is all too reminiscent of a period in American politics I thought this Administration had denounced."

Aspin is a member of the Seapower Subcommittee of the House Armed Services Committee, which has jurisdiction over all naval issues.

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